IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

MOTION TO DISMISS
and
BRIEF IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

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MOTION TO DISMISS

Defendant, the State of Louisiana, moves the Court to dismiss the Complaint for the reasons that (1) the Plaintiff States have been unable to demonstrate sufficient standing to invoke the original jurisdiction of this Court, and (2) there is now a new and additional state court action, pending in the Louisiana courts, that provides an appropriate forum in which all interested parties may appear and in which all the *issues* tendered here by the Plaintiff States may be expeditiously litigated. That state forum also provides an opportunity for an authoritative construction and interpretation of the new Louisiana First Use Tax statute, LA R.S. 47:1301-07, by the

Louisiana Supreme Court. Such a definitive delineation of this new and complex statute conceivably may render it unnecessary to resolve some, if not all the constitutional issues now pressed upon this Court, at least in their present formulation.

Two significant developments have occurred since this Court's order of June 18, 1979, allowing the filing of the Complaint by the Plaintiff States. Those events underscore and augment the appropriateness of dismissing the Complaint that has been filed. As more fully set forth in the accompanying brief, those events are:

(1) On August 28, 1979, some seventeen private pipeline companies filed in this Court a "Motion for Leave to Intervene as Plaintiffs and to File Complaint" in this original proceeding, No. 83, instituted by the Plaintiff States. The brief accompanying that motion (pages 12-13, 23), as well as the proposed complaint (page 29, paragraph 3), assert that it is the private pipeline companies, not the Plaintiff States, upon whom falls the "legal incidence" of the Louisiana First Use Tax in question, and that their "direct interests" in this controversy are not adequately represented by the Plaintiff States.

Apart from the fact that this Court's original jurisdiction does not extend to such a proposed complaint and claims by private pipeline companies against a sovereign State, the intervention papers conclusively demonstrate two things: (a) the real parties in interest in this state use tax controversy are the pipeline companies upon whom the "legal incidence" of the tax falls; and (b) the Plaintiff States represent only the ultimate gas consumers within those States, consumers who have only a remote and indirect interest in the tax laid upon the pipeline companies.

(2) On June 22, 1979, these same seventeen private pipeline companies filed an action in a Louisiana State Court

against the State of Louisiana and its tax officials, alleging that the Louisiana First Use Tax is unconstitutional for precisely the same reasons that are asserted before this Court in the Plaintiff States' Complaint and in the proposed complaint of the private pipeline companies. Docket No. 225,553, Nineteenth Judicial District Court in and for East Baton Rouge Parish, Louisiana. The Plaintiff States are free to intervene or otherwise participate in that state court proceeding to assert and protect whatever interests they may have. Already this state court action is at issue and thus ready for prompt development and discovery concerning the many facts that are essential to a delineation and resolution of the federal constitutional issues so identical with those now being prematurely pressed upon this Court.

These factors combine to render appropriate the dismissal of the Complaint of the Plaintiff States, particularly since this Court can now be assured that there is "no want of another suitable forum," *Massachusetts v. Missouri*, 308 US 1, 19 (1939), and that there now is a "pending state-court action [that] provides an appropriate forum in which the *issues* tendered here may be litigated," *Arizona v. New Mexico*, 425 US 794, 797 (1976).

Moreover, since the pleadings put before this Court do not reflect the constitutional issues that may survive a definitive interpretation and construction of the Louisiana First Use Tax statute by the Louisiana Supreme Court, the attempt by the Plaintiff States and others to secure a summary kind of judgment on the pleadings before this Court is misplaced. Until the statute has been authoritatively construed and possibly limited by the Louisiana court, no one can safely say what the precise constitutional issues are or will be. And an essential ingredient of the Louisiana court's articulation of the reach of the statute will be the discovery and assessment of the manifold facts as to the impact and effect of the Louisiana statute, as

well as its legislative purpose and history.

For all these reasons, developed at greater length in the accompanying brief, the State of Louisiana respectfully urges that this Motion to Dismiss be granted.

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BRIEF IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

By this brief, the State of Louisiana submits that its Motion to Dismiss should be granted and that the Plantiff States' Motion for Judgment on the Pleadings should be denied.

Out of the plethora of complaints, motions and briefs that have marked this original proceeding to date, two critical considerations emerge:

(1) It has become apparent beyond doubt that this tax controversy between seventeen pipeline companies and the State of Louisiana cannot and does not fall within the original jurisdiction of this Court. The Plaintiff States simply have no standing in this Court to assert and to adjudicate the pipelines' constitutional objections for the tax laid upon them by Louisiana. Moreover, since the pipelines have recently filed a tax refund suit in Louisiana that raises the identical objections, the availability of that forum makes it unnecessary to entertain this original proceeding any longer. Those are the reasons that prompt this Motion to Dismiss.

(2) The major constitutional issues that the Plaintiff States would have this Court resolve summarily on the pleadings are just not ready for resolution. As this brief demonstrates in Part III, the Plaintiff States have asserted a misleading, incorrect and confused version of the constitutional facts respecting the nature and impact of the Louisiana First Use Tax. This in turn causes the entirety of their constitutional arguments to be out of focus.

Any suggestion that this Court summarily adjudicate these important constitutional claims upon such factually faulty pleadings is impermissible. This Court does not sit to render constitutional rulings without first being assured that the facts which underlie the constitutional claims have been fully and accurately developed. See, e.g., *Townsend v. Sain*, 372 US 293, 312 (1963). If this Court determines to proceed with this original proceeding, these constitutional facts must be developed before a Special Master, as the State of Louisiana has suggested. But if the Court disagrees with that suggestion and determines that the constitutional questions are ready for consideration at this time, the State of Louisiana respectfully requests an opportunity to brief and orally argue those questions fully.

I.

THE JURISDICTIONAL AND STANDING DEFECTS IN THIS ORIGINAL PROCEEDING

The proposed complaint that the seventeen private pipeline companies seek to file in this Court brings into sharp focus the critical fact that the real parties in interest in this use tax controversy are the pipeline companies upon whom the incident of the Louisiana tax is laid. That fact has two consequences: (1) it lays bare the paucity and remoteness of the Plaintiff States' standing to bring this original action, and (2) it underscores the absence of any original jurisdiction in this Court to hear and determine a tax controversy brought against a sovereign State by private citizens of other States who are the only real parties in interest.

These consequences can best be appreciated by considering them in reverse order.

1. NEITHER ARTICLE III NOR 28 U.S.C. §1251 CONFERS ANY ORIGINAL JURISDICTION ON THIS COURT TO ENTERTAIN AN ACTION BROUGHT AGAINST A SOVEREIGN STATE BY CITIZENS OF OTHER STATES.

Protesting that their "direct interests" in this tax controversy with Louisiana are not fully or adequately represented by the Plaintiff States, the seventeen private pipeline companies have sought leave to intervene before this Court for the purpose of filing an independent complaint against the State of Louisiana. The practical justification for seeking such leave is said to be that the pipeline companies — rather than the Plaintiff States—are the only ones "liable for the taxes imposed by the First Use Tax statute" (proposed complaint, page 29, paragraph 3).

There can be no quarrel with the contention of the pipeline companies that they bear the legal incidence of the use tax in question. See *Arizona v. New Mexico*, 425 US 794, 797-798 (1976).[1] For that very reason, they are the real parties in interest in this tax controversy. But that fact does not suffice to confer original jurisdiction on this Court to consider the tax claims against a sovereign State by private citizens of other States who are the real parties in interest. The original jurisdiction of this Court ultimately turns on the language of Article III, not upon the degree of interest that a private party may have in a controversy with another State.

Preliminarily, it must be noted that Congress has not sought to recognize any original jurisdiction in this Court over suits brought against a State by citizens of another State. Sections 1251 (b) (3) acknowledges only that this Court shall have original but not exclusive jurisdiction over "actions or proceedings by a State against the citizens of another State or against aliens." Nothing is said about a reverse-type jurisdiction, i.e., actions against a State by citizens of another State.

The answer to that jurisdictional question is found in Article III, Section 2, Clauses 1 and 2[2]—the very provisions that the private pipeline companies propose as a basis for invoking this Court's original jurisdiction over their putative Complaint in Intervention (page 28, paragraph 1). Reading those provisions of Article III, this Court has said (*United States v. Texas*, 143 US 621, 643-644 [1892]),

> ". . . [T]hese words do not refer to suits brought against a State by its own citizens or by citizens of other

1. The Court there stated: "In denying the State of Arizona leave to file, we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities."

2. Clause 1 extends the judicial power of the United States to controversies "between a State and Citizens of another State." Clause 2 defines the original jurisdiction of this Court to include all cases "in which a State shall be Party."

> states, or by citizens or subjects of foreign states, even where such suits arise under the Constitution, laws, or treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against states."

When this Court attempted to read those Article III words to permit this Court to exercise original jurisdiction over private citizens' suits against a State, *Chisholm v. Georgia*, 2 Dallas 419 (1793), the Eleventh Amendment was quickly adopted to overrule that reading. In its exhaustive opinion on the impact of the Eleventh Amendment, *Monaco v. Mississippi*, 292 US 313, 329 (1934), this Court observed that,

> "To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar. Superseding the decision in *Chisholm v. Georgia, supra*, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent."

The pipeline companies have suggested in their response to the opposition to their intervention motion (pages 3-4), that Louisiana has somehow waived its Eleventh Amendment immunity and thus consented to be sued in this Court pursuant to this Court's Article III original jurisdiction. Reference is made in this respect to LA R.S. 47:1576, which creates a tax refund cause of action and acknowledges that such a legal remedy, including one that seeks a refund because the state tax statute allegedly violates the Federal Constitution, may be pursued in any state court or "in any case where jurisdiction is vested in any of the courts of the United States."

If that statutory provision were construed to constitute a waiver or a consent by Louisiana to suit by a private citizen of another State in the Supreme Court of the United States, — "a grave constitutional question would immediately arise." *California v. Arizona*, _____ US _____, 59 L. Ed. 2d 144, 150 (1979). None of the *Monaco* line of cases has ever suggested that the consent doctrine seemingly embedded in the Eleventh Amendment could be applied to a consent addressed to an exercise of this Court's original jurisdiction as defined by Article III. If Article III does not confer original jurisdiction on this Court over a private citizen's suit against a sovereign State, it would appear that no amount of consent or waiver could overcome that constitutional limitation.

Fortunately, that constitutional problem need not here be addressed. Fairly read, the Louisiana statute does not purport to consent to every kind of action brought in any federal or state court involving the validity of a Louisiana tax statute. It clearly does not consent to a declaratory judgment suit in any court, such as the pipeline companies propose filing in this Court. And it makes no mention of consenting to the institution of an original action in this Court. By its terms, LA R.S. 47:1576 only creates a remedy at law for recovery of taxes which have been paid under protest, and thus the State's consent only goes to such a tax refund suit. It is further limited by its terms to actions in any state or federal court having *jurisdiction of the parties and subject matter*. In discussing the companion statute, LA R.S. 47:2110, the Fifth Circuit has recently placed those statutes in proper prospective. "By its own terms, the statute is applicable only if federal court jurisdiction is otherwise vested." *United Gas Pipe Line Co. v. Whitman*, 595 F. 2d 323, 330 (1979).

There exists no recorded instance where this Court has exercised its Article III original jurisdiction allowing a private

citizen to sue a sovereign State premised upon a consent to such jurisdiction by the State. But the Louisiana consent statute in question does not purport to consent either to the type of declaratory action here proposed or to the exercise of this Court's original jurisdiction in contravention of Article III limitations.

2. NOT BEING THE REAL PARTIES IN INTEREST, THE PLAINTIFF STATES LACK ADEQUATE STANDING TO INVOKE THIS COURT'S ORIGINAL JURISDICTION.

The real parties in interest in this tax controversy are the private pipeline companies. They have sought to assert and protect that direct interest by moving to intervene in this Court in order to replace the Plaintiff States' Complaint with one of their own, one that will adequately reflect those private interests.

As has been shown above, the original jurisdiction conferred on this Court by Article III does not encompass such a private cause of action against a sovereign State. But that jurisdictional defect aside, the very effort of the private pipeline companies to displace the Plaintiff States as the real parties in interest before this Court exposes the frailty and tenuousness of the States' interests. It has now become an established proposition that the States' standing rests solely on an indirect interest in the tax controversy between the private pipeline companies and the State of Louisiana.

The State of Louisiana, in other words, has imposed no use tax on the Plaintiff States to the extent that any of them may be consumers of the gas processed in Louisiana. Nor has Louisiana imposed any such use tax on the private gas consumers residing in any of the Plaintiff States.

Indeed, to the extent that such gas consumers may be

said to be injured by the higher prices they now pay for gas transported from Louisiana, that injury has not been caused by the assessment of the Louisiana First Use Tax on the private pipeline companies. The cost of that tax has been passed on to consumers solely because the private pipeline companies have so willed it. And that pass-on has occurred with the approval and authorization of the Federal Energy Regulatory Commission, acting pursuant to the Federal Natural Gas Act and the Natural Gas Policy Act of 1978. Louisiana has played no part in so transferring to the consumers the cost of the tax assessed on the pipeline companies. There are no allegations to the contrary in any of the motions and briefs before this Court.

All of this being true and uncontested, the following conclusions can be drawn respecting the standing of the Plaintiff States to pursue their Complaint before this Court:

(a) The Plaintiff States have brought this action in part in their purported proprietary capacity as gas consumers, alleging that their gas consumption bills have been increased as a result of the passing on to consumers of the Louisiana First Use Tax imposed on the pipeline companies. The question thus becomes whether the injury for which these consumer States seek redress gives rise to any recognized cause of action under some statute or common law principle. *Hawaii v. Standard Oil Co.*, 405 US 251, 259 (1972).

The short answer is that no such cause of action has been recognized in American law, and none is even alleged by the States. The price one pays for gas or any other commodity contains a host of "hidden" taxes and costs that the manufacturer or seller has succeeded in passing on to the consumer. But no court has ever suggested or held that the consumer thereby has a cause of action protesting the validity of all or any of these "hidden" taxes. There is no need to recog-

nize such a cause of action as long as the party upon which the tax is directly laid—the taxpayer—is capable of challenging the validity of any tax that has been added to the price of the commodity. Here, of course, the tax paying pipeline companies have shown themselves to be quite capable of protesting the Louisiana First Use Tax and of doing so in the proper forum, the Louisiana state courts.

Moreover, it cannot be said that the injury for which these States have sought redress "was directly caused by the action of another State." *Pennsylvania v. New Jersey*, 426 US 660, 663 (1976). The increase in the price of gas was not "directly" caused by the imposition of the Louisiana First Use Tax on the pipeline companies. That so-called injury was "directly" caused by the refusal of the pipeline companies to absorb the tax laid upon them and by the action of the Federal Energy Regulatory Commission in approving a passing-on to the consumers of this tax.

In sum, as consumers the States have demonstrated no cause of action for any injury that is so indirectly traceable to the actions of Louisiana. The States have placed themselves in the untenable position of trying to litigate as volunteers the tax claims of some seventeen private pipeline companies. Cf. *Pennsylvania v. New Jersey, supra*, 665.

This Court's decision in *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220 US 277 (1911), stands as a complete bar to the maintenance of such a "volunteer" action. The Court there held that Oklahoma had no standing or interest in its corporate capacity to invoke the Court's original jurisdiction to seek an injunction against a railroad that was charging allegedly unreasonable freight rates to shippers doing business in Oklahoma. The State of Oklahoma in its corporate capacity, said the Court (at page 286),

> ". . . [W]ould have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma."

The Court added that Oklahoma had "no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws." And so in the instant case, the Plaintiff States have "no direct interest" in the property rights of the seventeen pipeline companies that are "immediately affected" by the imposition of the Louisiana First Use Tax.[3]

(b) The Plaintiff States acquire no greater standing to bring this action as *parens patriae* for "the citizens of each plaintiff state" who purchase or receive "natural gas supplies . . . delivered by interstate natural gas pipeline companies who will be subject to the tax and who will collect such tax from Plaintiff States and their citizens." (Paragraph XV of Complaint).

It is immediately obvious that the State's *parens patriae* standing suffers the same deficiencies that mark the State's proprietary standing. The citizen consumer of natural gas in these States have no recognizable legal interest in any "hidden" tax or cost that is integrated into the price paid for the gas purchased, at least where there is an identifiable taxpayer upon whom such a tax is directly laid and who is capable of protesting the validity of the tax. As the Solicitor General's *amicus* brief has acknowledged (page 9), the tax in this case "is not imposed on the citizens of the complaining states, but its economic burden falls primarily upon them in the form of

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3. Paragraph XI of the Complaint filed by the Plaintiff States concedes that it is the "interstate pipelines upon whom the [Louisiana] tax will be imposed."

higher rates passed through to them by the tax-paying producers and pipelines."[4]

But such an indirect "economic burden," a burden shared only by those citizens who use or purchase gas, has never been deemed the kind of general, direct injury to a state's entire economy, or the health and welfare of its citizens, that will support *parens patriae* standing. Cf. *Georgia v. Pennsylvania R. R.*, 324 US 439 (1945); *Hawaii v. Standard Oil Co.*, 405 US 251 (1972). While there are elements of injury to the gas consuming citizens who must pay higher prices, with perhaps some general resulting impact upon a state's economy, the injury itself must be directly traceable to the actions of the defendant State. And *parens patriae* standing to assert indirect injuries to the citizens of a State becomes even less tenable when there is "a more appropriate party or parties capable of bringing the suit," *Commonwealth of Pennsylvania v. Kleppe*, 533 F. 2d 668, 675 (App. D. C. 1976), to assert the direct injury to those directly affected by the tax.

It thus becomes apparent that the States have no standing, either proprietary or *parens patriae*, to assert in this Court a claim that a "hidden" tax passed on to all gas consumers is unconstitutional. That claim is being made by the taxpayers upon whom the "hidden" tax has been directly laid.

II.

THE STATE COURT IS AN APPROPRIATE FORUM FOR ALL PARTIES TO LITIGATE THE ISSUES TENDERED IN THIS PLEADING

This case primarily involves a question as to the constitutionality of Act 294 of the 1978 Regular Session of the

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4. The Solicitor General's brief (page 9) also acknowledges that the gas consuming citizens "have no practical remedy against the allegedly unconstitutional exaction." But if that is true, how can the States assert as *parens patriae* such a non-existent "practical remedy"?

Louisiana Legislature, commonly referred to as the "First Use Tax on Natural Gas," and incorporated in the statutes of the State of Louisiana as Chapter 16, Title 47, Section 1301, et seq., of the Louisiana Revised Statutes.

The officials charged with the responsibility of administering and enforcing this statute instituted a declaratory judgment action in the proper State Court in Baton Rouge, Louisiana, seeking a declaration by the Court that the First Use Tax on Natural Gas is "legal, valid and constitutional, all in accordance with its terms, conditions and provisions." Named as defendants in this proceeding were all the parties against whom the legal incident for the tax was levied [including the pipeline companies who have sought intervention here]. After issue was joined, and discovery was commenced, the case was removed to the Federal Court for the Western District of Louisiana and subsequently remanded to the state court, [*Edwards v. Transcontinental Gas Pipe Line*, 464 F. Supp. 654 (1979)], where the case is being actively pursued by all of the parties.

After the remand, the instant case was filed by the Plaintiff States. Numerous pleadings and briefs have been filed. In one of these, the Solicitor General, in discussing the state court proceeding, asserted that "it is even more doubtful that the declaratory judgment action presents an Article III case or controversy, since it appears essentially to request an advisory opinion. In these circumstances, it does not appear that review of the ultimate decision of the Louisiana courts would be available in this Court." [Brief for the United States and the Federal Energy Regulatory Commission as *amici curiae* (as filed on June 12, 1979), Pages 12-13].[5]

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5. Louisiana does not agree with this statement concerning this Court's jurisdiction as it relates to review of an action brought under the Louisiana declaratory judgment act. Additionally, Louisiana does not agree that a decision rendered in a declaratory judgment proceeding is advisory. *Edwards v. Parker*, 332 So. 2d. 175, 180 (1976).

Shortly after the filing of this brief, the Court granted the Motion of the Plaintiff States to file a Complaint. Thereafter, a new state court action was filed which is without the disabling features suggested by the Solicitor General as precluding ultimate review by this Court. This action was brought by the pipeline companies and is in the nature of a refund suit for taxes paid [and to be paid]. The same five issues as raised by the Plaintiff States in this proceeding are being asserted in the state court litigation. It is to be noted that these same five issues are also raised in the complaint these pipeline companies seek permission to file with this Court.[6] This is illustrated as follows:

(See Following Page)

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6. In addition, two other lower court proceedings have been instituted in which these same five constitutional issues have been raised. *Edwin W. Edwards, et al., v. Transcontinental Gas Pipeline Corp., et al.,* Nineteenth Judicial District Court, Louisiana, No. 216,867, filed September 22, 1979 and *Federal Energy Regulatory Commission v. McNamara, et al.,* MD La. Civil Action No. 78-384. Stay order issued January 26, 1979 (see Opinion in the Appendix to this brief) Appealed Fifth Circuit No. 79-1403. Argument date June 26, 1979, the Assignment was vacated and the matter was stayed. This makes a total of three forums where these issues have already been tendered, are being litigated, and in which appropriate relief may be had. The third forum, the tax refund suit, as filed in the State Court by the private pipeline companies on June 22, 1979, *Southern Natural Gas Company, et al. v. Shirley McNamara, et al.,* is undoubtedly the most appropriate forum of these three, this Court having held that this specific kind of refund procedure in Louisiana is an appropriate remedy justifying federal court abstention, *Great Lakes Dredge & Dock Co., v. Huffman,* 319 US 293 (1943).

	THE CAUSES OF ACTION AS ALLEGED IN THE PLAINTIFF STATES' COMPLAINT HEREIN		THE STATE COURT REFUND PETITION AS FILED BY THE PIPELINE COMPANIES	THE COMPLAINT THE PIPELINE COMPANIES SEEK TO FILE IN THIS COURT
First	That the First Use Tax constitutes an unreasonable burden on interstate commerce	¶¶ XXXIII - XLV	¶¶ 24(a-d) - 25(a-h)	¶¶ 24(a-d) - 25(a-h)
Second	That it conflicts with federal statutes regulating the interstate transportation and sale of natural gas	¶¶ XLVII - LI	¶¶ 32(a-c) - 33	¶¶ 28(a-c) - 29
Third	That as applied to imported gas it violates the Import-Export Clause	¶¶ LIII - LVIII	¶ 34	¶ 30
Fourth	That it impairs the obligation of contracts	¶ LX	¶ 27	¶ 26
Fifth	That it violates the Fourteenth Amendment by depriving the plaintiff States and their citizens the equal protection of the law	¶¶ LXII - LXVI	¶¶ 31(a-b), 35	¶¶ 29(a-b), 31

The total identity of the issues put before this court and put before the Louisiana state court provides a practical opportunity for applying and following the principle epitomized by *Arizona v. New Mexico*, 425 US 794 (1976). That principle recognized that this Court need not and should not exercise its original jurisdiction if there is another forum available where there is jurisdiction over the named parties, where the issues tendered may be litigated and where appropriate relief may be had. See also *Illinois v. City of Milwaukee*, 406 US 91, 93-94 (1972). As the *Arizona* opinion emphasizes, 425 US at 797, a pending state court action is a peculiarly appropriate forum if the "issues" tendered before this Court may be litigated in that state court.

The pending state court action brought by the seventeen pipeline companies fits squarely within the four corners of this prudential principle that overlays this Court's exercise of its original jurisdiction to-wit:

(1) The issues tendered to this Court both by the Plaintiff States and by the putative intervenors, the pipeline companies, are identical to those raised by the pipeline companies in the pending state court tax refund proceeding.

(2) The pending proceeding in the Louisiana state court allows those issues to be litigated in a direct confrontation between the only real parties in interest—the pipeline companies and the State of Louisiana. As indicated in Part I of the brief, it is unlikely that the pipeline companies can ever be made parties to the original proceeding in this Court. But the Louisiana proceeding obviously does afford the pipeline companies the opportunity to be party plaintiffs in a refund suit wherein their real interest can be asserted and adjudicated. And the Plaintiff States, whose indirect interest may well deprive them of standing to pursue this original action in this Court, are free

to intervene or otherwise assert those indirect interests in the pending refund action in Louisiana.

(3) To paraphrase what was said in the *Arizona* opinion, 425 US at 797, if on appeal the Louisiana Supreme Court should hold the First Use Tax unconstitutional, the Plaintiff States and the pipeline companies will have been vindicated; but if, on the other hand, the tax is held to be constitutional, "the issues raised now may be brought to this Court by way of direct appeal under 28 USC §1257 (2)." See *Arizona Public Service Co. v. Snead,* — US —, 60 L. Ed. 2d 106 (1979).

(4) In *Great Lakes Dredge & Dock Co. v. Huffman,* 319 US 293, 296-297 (1943), this Court held that the existence of the Louisiana tax refund procedure that the pipeline companies have here instituted, a procedure stemming from Section 18 of Article 10 of the Louisiana Constitution [now Article VII, Section 3, 1974 Louisiana Constitution], constitutes a sound reason for a federal court withholding any injunctive or declaratory relief against the collection of Louisiana state taxes. In this Court's words, 319 US at 301, in such a suit in the Louisiana courts the taxpayer "may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." No reason is apparent why this Court should not follow the abstention principle embodied in the *Great Lake's* decision by withholding the exercise of its original jurisdiction in this instance.[7]

7. The Solicitor General in Brief for the United States and the Federal Energy Regulatory Commission as *amici curiae* as filed on June 12, 1979, has suggested on Page 4 that "The United States and the Commission are therefore interested in the prompt resolution of the issues presented in the complaint herein." The state court refund suit is a quick and ideal method of resolving the issues herein presented without the necessity of this Court exercising its original jurisdiction. Louisiana procedure permits an expeditious hearing. Once the constitutional facts are assembled, the matter may then bypass the District Court, the Court of Appeal and proceed directly to the Louisiana Supreme Court under its supervisory jurisdiction for a decision on the merits. This has been done where conditions require or justify such action. See *Bates v. Edwards,* 294 So. 2d 532 (1974) and *Edwards v. Parker,* 332 So. 2d 175 (1976).

(5) Finally, the pendency of the state court tax refund suit affords a ready forum for (a) the development of a definitive state court construction and interpretation of the First Use Tax statute, and (b) the development of the essential constitutional facts relating to that binding construction of the state statute. In other words, the whole notion of withholding or postponing federal jurisdiction—including the original jurisdiction of this Court—contemplates that new state "enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality" *Harrison v. NAACP*, 360 US 167, 178 (1959) and "that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law," *Spector Motor Service, Inc. v. McLaughlin*, 323 US 101, 105 (1944) and cases cited. Such factors speak loudly in favor of withholding the exercise of this Court's original jurisdiction until the Louisiana courts have supplied a definitive construction of this new and complex state First Use Tax statute and have developed the essential facts from which to assess the constitutionality of the state court's construction of that statute.

Paraphrasing what was said in the *Spector Motor case*, 323 US at 104, even if the Louisiana First Use Tax statute "hits aspects of an exclusively interstate business, it is for (Louisiana) to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Everyone of these questions must be answered before we reach the constitutional issues . . ."

Because the Complaint of the Plaintiff States rests so much upon "preliminary guesses regarding local law", guesses that are both speculative and often erroneous as to the underlying facts and the statutory reach, this Court should dismiss this original proceeding.

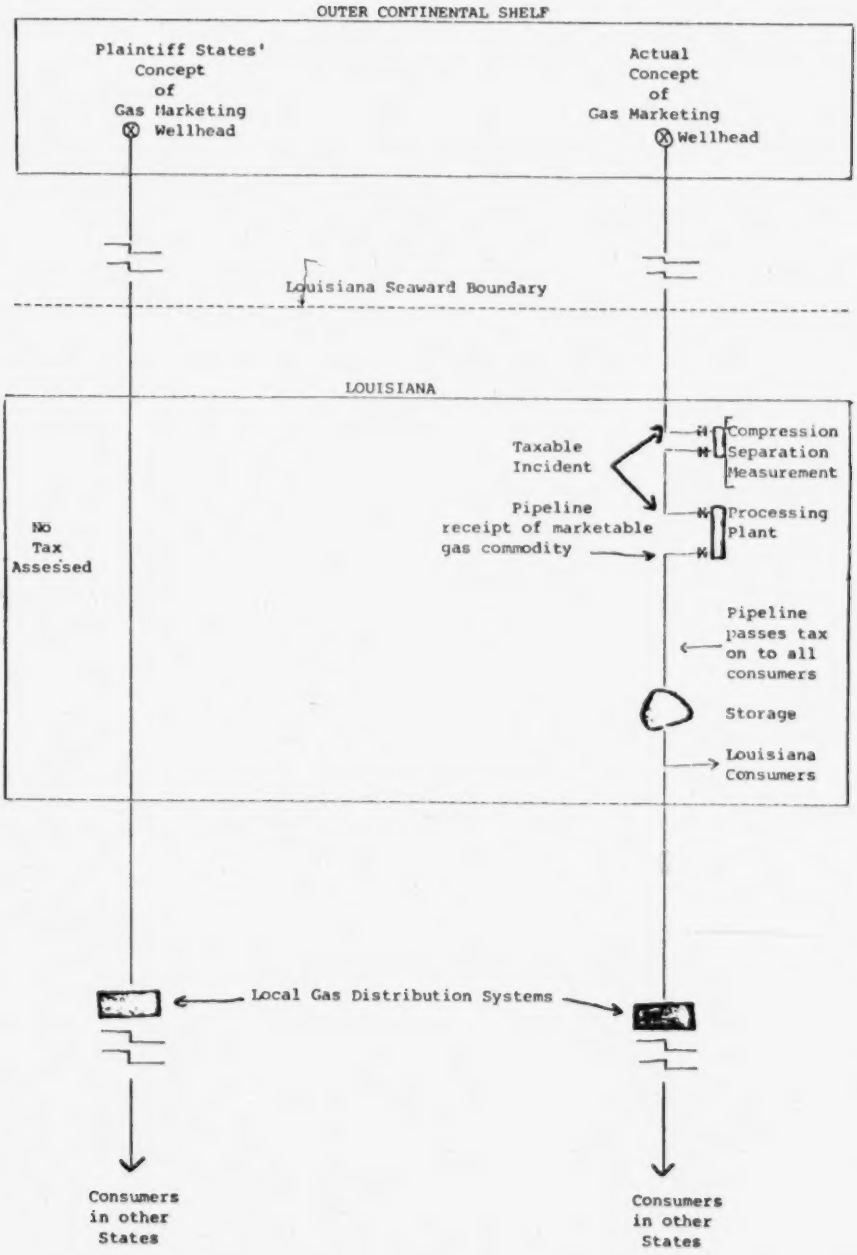
III.

THERE ARE COMPELLING REASONS REQUIRING A FACT DETERMINATION PRIOR TO A CONSIDERATION OF THE MOTION FOR A JUDGMENT ON THE PLEADINGS

The Plaintiff States are under the mistaken belief that the gas commodity ultimately delivered to the homes of their citizens for consumption is identical to the raw, or natural, gas resource which originates on the Outer Continental Shelf and from which the standardized consumable commodity is derived. "The form of the gas is not changed in any way because it passes through Louisiana." (Brief of the Plaintiff States in Support of Motion for Judgment on the Pleadings, page 19.) The following diagram clearly reflects that such is not factually correct.

(See Next Page)

FACTUAL DIAGRAM



In fact, the gas in question is not in a standard marketable condition when produced at the wells on the Outer Continental Shelf.[8] It is brought into the State of Louisiana where it is subjected to extensive processing, refinement, treating, dehydration, compression and change in form and content to make the end product economically transportable over long distances under the applicable rate structure, and to enable the pipeline owners to receive only that standardized portion of the BTU content of the original gas stream to which their purchase contract entitles them and the federal rate and regulatory structure requires for delivery to gas customers. At processing plants costing millions of dollars, the product is subjected to changes in temperature, pressure, form, content, value, molecular makeup and potential use. Much of the gas when produced from the Outer Continental Shelf contains excessive water, corrosives and other impurities which must first be removed by a series of mechanical and chemical processes designed to change the pressure and flow characteristics of the original stream, thereby allowing some of the undesired heavier components to be removed. Thereafter, by a series of temperature changes, pressure changes, and the application of other products and chemicals the constituent chemical makeup and BTU content of the gas is drastically altered from its original form. Propane is removed, butane is taken out and ethane is extracted. The gas is enveloped by a varsol oil solution from which it is again cleansed, refined, pressure changed and warmed to normal temperatures. The components thereby removed are distributed to other points for various purposes and the remaining gas, which is then nearly pure methane consisting at this point of approximately one million BTU's per thousand

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8. See dissenting opinion of Justice Clark in *Phillips Petroleum Co. v. State of Wisconsin*, 347 US 672 at 692 (1954), where the need for processing was recognized so as to make the fuel marketable:

> ". . . The processing of the gas at this central gathering plant is necessary to remove hydrocarbons, hydrogen sulphide and other foreign elements in order to permit its use as fuel."

cubic feet, is delivered to the pipeline owners where it is measured, paid for and transported for distribution to ultimate consumers.

At the time of processing, the natural gas stream is owned by the pipeline companies. By private contract, approved by the Federal Energy Regulatory Commission, the pipeline companies assign their interest in some of the components of the gas stream to others, and it is only after the extensive and multitudinous steps of the processing application that the properly constituted marketable portion of the gas is delivered into an interstate system for transportation and distribution. The gas is measured and paid for only at the tailgate of the processing plant where it is a vastly different commodity than that which was produced from the bore hole of the well on the Outer Continental Shelf. Some of the gas is placed into storage fields in Louisiana where it abides until required for seasonal uses by its owner. That product from the Outer Continental Shelf cannot be transported in its original condition to the ultimate consumer at the present price fixed in the rate structure of the pipeline owners by the Federal Energy Regulatory Commission because the additional weight and corrosive characteristics of the original stream would require that vastly greater costs be passed on to the consumer to recompense the pipeline owners for the additional BTU's, compression and line maintenance costs which would occur.

Additionally, and perhaps most importantly, the pipeline purchase costs fixed by private contract and approved by the Federal Energy Regulatory Commission provide only for the payment and receipt of a certain BTU content range, deviation from which would result in ultimate consumers either receiving a commodity which their standardized gas appliances are not designed to burn, thereby creating safety hazards, or receiving a product with a heating value worth far less than the price they are paying. Moreover, the processing incident

itself may only be performed one time. It is not subject to repetitive performance in the several states through which the gas passes en route to its ultimate consumption. Once the water and the impurities have been removed, once the butane has been extracted and the propane and the ethane taken out, it may not again be subjected to those uses for it has then been reduced to the standardized energy product for which the consumers of Plaintiff States are equipped to use.

As was said in the Motion to Dismiss, page 3, "[S]ince the pleadings put before this Court do not reflect the constitutional issues that may survive a definitive interpretation and construction of the Louisiana First Use Tax statute by the Louisiana Supreme Court, the attempt by the Plaintiff States and others to secure a summary kind of judgment on the pleadings before this Court is misplaced. Until the statute has been authoritatively construed and possibly limited by the Louisiana court, no one can safely say what the precise constitutional issues are or will be. And an essential ingredient of the Louisiana court's articulation of the reach of the statute will be the discovery and assessment of the manifold facts as to the impact and effect of the Louisiana statute, as well as its legislative purpose and history."

As has been previously stated, and is now being reiterated, if this Court determines to proceed with this original proceeding, these constitutional facts must be developed before a Special Master, as the State of Louisiana has suggested. But if the Court disagrees with that suggestion and determines that the constitutional questions are ready for consideration at this time, the State of Louisiana respectfully requests an opportunity to brief and orally argue those questions fully.

All the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 22nd day of October, 1979, I served copies of the foregoing Motion to Dismiss and Brief in Support of Motion to Dismiss and in Opposition to Motion for Judgment on the Pleadings by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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All parties required to be served have been served.

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FEDERAL ENERGY REGULATORY COMMISSION,
825 North Capitol Street, N.E.
Washington, D. C. 20426

versus

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CIVIL ACTION
NUMBER 78-384

* * * * * *

E. GORDON WEST, District Judge:

This is a suit brought by the Federal Energy Regulatory Commission, an agency of the United States of America,

seeking a declaratory judgment holding the Louisiana First Use Tax on Natural Gas, La. Rev. Stat. 47:1301-1307, unconstitutional, and seeking also injunctive relief, enjoining the defendants from implementing and enforcing that statute. The defendants are Shirley McNamara, Secretary of the Department of Revenue and Taxation of the State of Louisiana, William J. Guste, Jr., the Attorney General of the State of Louisiana, and Raymond T. Sutton, Commissioner of Conservation and Assistant Secretary for Conservation of the Department of Natural Resources of the State of Louisiana. Plaintiff alleges that it is these defendants who are charged, in the Act, with the duty of implementing and enforcing the First Use Tax on Natural Gas.

Defendants have filed a motion to dismiss for lack of jurisdiction, or in the alternative, to stay these proceedings pending the outcome of a case filed in the State Court seeking similar relief. Also, a motion to intervene as plaintiffs has been filed by approximately 42 natural gas distributors, collectively known as the Associated Gas Distributors. They allege that none of the prospective intervenors are incorporated in the State of Louisiana, and that none of them has a principal place of business in Louisiana. It is these motions that are presently before the Court.

In July of 1978, the Louisiana Legislature, in Regular Session, passed, and the Governor signed into law, a tax statute known as the First Use Tax on Natural Gas. This statute was codified as La. Rev. Stat. 47:1301-1307. By its terms, the First Use Tax becomes effective and enforceable at 7:00 a.m. on April 1, 1979. In general, the First Use Tax is imposed, at a rate of 7 cents per thousand cubic feet, "upon the first occurrence within [Louisiana] of any use * * * of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not

subject to the levy of any import tax or tariff by the United States as an import from a foreign country." The Act specifically states that it is not a tax on the production, severance or ownership of natural gas produced outside of the boundaries of the State of Louisiana, and that the tax is not upon the natural gas nor upon the property or rights from which it is produced. The tax is stated to be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use as defined in the statute, within the State of Louisiana.

There are other provisions of the statute which define terms used therein as well as stating the purposes and policies underlying the statute. There are also exclusions, exemptions, enforcement provisions and penalties provided therein.

Since immediately upon passage of the First Use Tax, its constitutionality was being questioned, particularly by certain gas transmission companies who would be subject to it, the Governor of the State of Louisiana, together with Shirley McNamara and William J. Guste, Jr., both defendants in the present suit, initiated a suit in a State Court of competent jurisdiction in Louisiana, seeking a declaratory judgment as to the validity of the First Use Tax. Made defendants in that suit were about 23 gas pipeline or transmission companies who would be subject to the tax if its validity were upheld. That suit was filed on September 22, 1978. On October 20, 1978, those defendants removed that case to this Court, claiming diversity of citizenship and federal question jurisdiction. The plaintiffs moved to remand. For written reasons assigned, a copy of which will be attached hereto as Appendix I [see 464 F. Supp. 654 (1979], this Court granted the motion to remand and that case is now ripe for adjudication by a State Court of competent jurisdiction. The primary reason for the remand was that 28 U. S. C. §1341, the Tax Injunction Act, prohibits this Court from enjoining the assessment, levying, or

collecting of a state tax where a plain, speedy, and efficient remedy may be had in the courts of the State. In the present case, when reduced to its essentials, the very same issues are presented as those presented in the case now in the State Court. The same declaratory and injunctive relief is sought in both cases. Both cases involve the same ultimate question, i.e., whether or not the tax statute passed by the Louisiana Legislature is in violation of federal law and thus invalid.

While their presence may not be deemed necessary to the protection of their interests, nevertheless, the parties to this suit may, if they wish, petition to intervene in the State Court suit. That remedy is available to them if they wish to seek it. At any rate, a determination of the pending State Court suit will either render the issues in this suit moot, or will so narrow any remaining issues in this case that efficient use of judicial time requires that further proceedings in this suit be stayed pending the outcome of the State Court action. To proceed now with this suit in this Court would completely defeat the purpose of the remand of the prior action. Title 28, U. S. C., Section 2201, conferring upon Federal Courts the power to render declaratory judgments, does not supply independent grounds of jurisdiction where none otherwise exist, and is coterminous with the breadth of the Tax Injunction Act, 28 U. S. C. §1341. *Rolls-Royce Ltd., etc. v. United States*, 364 F. 2d 415 (Ct. of Claims—1966); *Lear Siegler, Inc. v. John S. Adkins*, 330 F. 2d 595 (CA 9—1964); *McGlotten v. Connally*, 338 F. Supp. 448 (D.C. D.C.—1972). When the Declaratory Judgment Statute says that the Court "may" declare the rights as between the parties, it does not mean that it "shall" do so. *Solenoid Devices, Inc. v. Ledex, Inc.*, 375 F. 2d 444 (CA 9—1967). That statute is merely an enabling act which confers discretion upon the Court rather than a right upon the litigants. *Green v. State ex rel Faircloth*, 318 F. Supp. 745 (D.C. Fla.—1970).

Plaintiffs seek both declaratory judgment and injunctive relief. Without passing upon the question of whether or not injunctive relief may be granted in a suit seeking a declaratory judgment, and without in any way passing upon questions of jurisdiction or upon the merits of this case, the Court, in the exercise of its discretion, will stay these proceedings pending the outcome of the State Court action.

Those seeking to intervene in this suit do so under Rule 24(b) (2) of the Federal Rules of Civil Procedure. That rule sets forth the requirements for a "permissive" intervention as distinguished from an intervention "of right." Such an intervention is within the sound discretion of the Court to grant or deny. Consideration must be given to the question of whether or not the intervenors' rights can be adequately protected without their presence in the suit, and also to the question of whether or not the addition of a large number of additional parties will unduly delay or unduly complicate the progress of the suit. In view of the Court's decision to stay these proceedings, it is concluded that the rights of the proposed intervenors will in no way be prejudiced by denying intervention at this time. The Court concludes that intervention at this time will tend to unduly burden the record for no justifiable reason. All issues raised by all parties, including those raised by the proposed intervenors, are presently contained in the record, and at the present time the interests of movers for intervention are adequately represented and protected. An order will be entered in this matter granting the defendants' motion to stay proceedings, and denying intervenors' motion to intervene in this suit.

Baton Rouge, Louisiana, January 26, 1979.

/s/ E. GORDON WEST
UNITED STATES DISTRICT JUDGE